STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal From The Michigan Court of Appeals
Honorable Bill Schuette, Presiding

HARTMAN & EICHHORN BUILDING CO., INC., a Michigan corporation,
Plaintiff/Counterdefendant,

v

STEVEN DAILEY and JANINE DAILEY, a married couple; and ABN-AMRO d/b/a STANDARD FEDERAL BANK, jointly and severally,
Defendants,

and

STEVEN DAILEY and JANINE DAILEY,
Counterplaintiffs/Third-Party Plaintiffs/Appellees,

v

JEFFRY R. HARTMAN, an individual,
Third-Party Defendant/Appellant.

Supreme Court Docket No. 129733

Court of Appeals Docket No. 249847

Oakland County Circuit Court
Case No. 01-032203-CK

MICHIGAN ASSOCIATION OF HOME BUILDERS' BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT, JEFFRY R. HARTMAN

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to MCR 7.301(A)(2) and 7.302, an Application for Leave to Appeal from a September 13, 2005 Order denying Third-Party Defendant's Motion for Reconsideration having been timely filed on October 24, 2005 and that Application for Leave to Appeal having been granted by Order dated May 4, 2006.

QUESTION PRESENTED FOR REVIEW

I. ARE LICENSED RESIDENTIAL BUILDERS, WHOSE CONDUCT IS BOTH AUTHORIZED BY AND REGULATED BY THE STATE OF MICHIGAN PURSUANT TO THE MICHIGAN OCCUPATIONAL CODE, MCL 339.101 *et seq*, EXEMPT FROM LIABILITY UNDER THE MICHIGAN CONSUMER PROTECTION ACT?

Third-Party Defendant/Appellant, Jeffry R. Hartman, answers "Yes."

Defendants/Counterplaintiffs/Appellees, Steven and Janine Dailey, answer "No."

The Michigan Court of Appeals answered "No."

The trial court, it is assumed, would answer "Yes."

Amicus Curiae, Michigan Association of Home Builders, answers "Yes."

I. INTRODUCTION

The Michigan Association of Home Builders (the "Association") is a state-wide trade association whose members consist of developers and builders of single and multi-family homes. One of the Association's primary goals is to provide the opportunity for all Michigan residents to own an affordable home. To promote this goal and others, the Association seeks to oppose laws and court decisions which might expose its members to unjust and unwarranted civil liability, thereby increasing the cost of constructing homes. This is clearly one of those cases.

II. SUMMARY OF ARGUMENT

This appeal involves a straightforward legal issue: whether licensed residential builders can be held liable for alleged violations of the Michigan Consumer Protection Act, MCL 445.901, *et seq* (the "MCPA"). The Association submits that in light of this Court's decision in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999), the answer to this question is clearly "no." The conduct of licensed residential builders is both authorized and extensively regulated by the State of Michigan pursuant to the applicable provisions of the Michigan Occupational Code. MCL 339.101, *et seq* (the "Code"). As a result, in accordance with *Smith*, residential builders, when engaging in activities regulated by the Code, are exempt from liability under the MCPA pursuant to MCL 445.904(1)(a).

The Court of Appeals, in a published opinion, clearly recognized *Smith*'s application to this case, and agreed with the result it compels, but nonetheless held that Third-Party Defendant/Appellant, Jeffry Hartman ("Hartman"), a licensed residential builder, was not exempt under the MCPA. The Court of Appeals stated:

> This leaves us with Hartman's appellate argument that the MCPA does not apply to actions taken by him or HEBC because the act of a building contractor repairing a house is regulated by the Occupational Code. We agree, but we are bound by precedent to hold otherwise.
>
> Applying *Smith* to this case, we would find that the statutes allow only licensed residential builders or alteration contractors to perform the reconstruction work at issue here, MCL 339.601(1), 339.2401, 339.2404, and Hartman held the license for HEBC in accordance with MCL 339.2405. Therefore, Hartman and HEBC were generally allowed by statute to make the repairs and renovations to the Daileys' home, and the MCPA should not apply. However, in *Forton, supra* at 715, we expressly held that residential builders are subject to the MCPA. While we question the wisdom of either *Smith* or *Forton*, we are bound by MCR 7.215(J)(1) to apply *Forton* and hold Hartman accountable under the MCPA.

See, Court of Appeals Opinion, May 26, 2005 ("5/26/05 Opinion"), pp 4-5 (footnote omitted; emphasis supplied), Appellant's Appendix, pp 41a-42a.

The Court of Appeals found a conflict between the present case and its prior opinion in *Forton v Laszar*, 239 Mich App 711; 609 NW2d 850 (2000), lv den 463 Mich 969 (2001).[1] Notwithstanding the apparent conflict, the Court of Appeals denied the convening of a special panel by Order dated June 22, 2005. See, Court of Appeals Order, June 22, 2005 ("6/22/05 Order), p 1, Appellant's Appendix, p 46a. From that Order, Hartman filed a timely Motion for Reconsideration on July 13, 2005. The panel ruled on Hartman's Motion for Reconsideration on September 13, 2005.

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[1] As discussed below, the Association believes that there is no conflict between the present case and *Forton* and that *Forton* may be distinguished. However, since the Court of Appeals did find a conflict (where there may not be one) and expressly held so in a published opinion, it is even more critical that the Court of Appeals' decision be reversed.

Significantly, all three Court of Appeals judges agreed "that the Michigan Consumer Protection Act (MCPA) does not apply to building contractors." However, ultimately, in a 2-1 decision, the Court of Appeals denied the Motion for Reconsideration. See, Court of Appeals Order, September 13, 2005 ("9/13/05 Order"), Appellant's Appendix, pp 47a-48a. In significant part, the Court of Appeals stated:

> The Court orders that the motion for reconsideration is DENIED. Judges Schuette and Sawyer, while voting to DENY the motion for reconsideration, agree that the Michigan Consumer Protection Act (MCPA) does not apply to building contractors and that the **resolution of this issue is best determined on appeal to the Michigan Supreme Court** or by a case that was not subject to a conflict panel pursuant to MCR 7.215.

See, 9/13/05 Order, p 1 (emphasis supplied), Appellant's Appendix, p 47a.[2]

As recognized by the Court of Appeals, this Court's holding in *Smith* compels the conclusion that licensed residential builders are exempt from liability under the MCPA. The Court of Appeals would have found this to be the case but for its perceived conflict between its own opinion and the opinion in *Forton*, *supra*. Resolution of this issue involves legal principles of major significance in this State's jurisprudence; that is, application of the MCPA to hundreds of thousands of professionally regulated entities throughout the State. More importantly, if permitted to stand, the published Court of Appeals Opinion in this case is in direct conflict with this Court's decision in

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[2] By contrast, Judge O'Connell would have granted the Motion for Reconsideration, stating that where all three panel members agree that the MCPA does not apply to residential builders, "logic dictates that the motion for reconsideration should be granted." See, 9/13/05 Order, p 2, Appellant's Appendix, p 47a.

Smith, *supra*. MCR 7.302(B)(3) and (5). Accordingly, the Court of Appeals' decision must be reversed, and the trial court's decision dismissing the MCPA claim against Third-Party Defendant, Jeffry R. Hartman, reinstated.

III. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. Background Facts

The Association generally accepts the statement of facts contained in Third-Party Defendant/Appellant's Brief on Appeal, as highlighted by the following:

(1) Third-Party Defendant/Appellant, Jeffry R. Hartman ("Hartman"), and Plaintiff/Counterdefendant, Hartman & Eichhorn Building Co., Inc. ("HEBC"), were, at all times relevant, residential builders, licensed by the State of Michigan. See, License Verifications, Appellant's Appendix, pp 200a-201a.

(2) HEBC and Hartman were, at all times relevant, regulated by the State of Michigan.

(3) Defendants/Counterplaintiffs/Third-Party Plaintiffs, Steven and Janine Dailey (the "Daileys"), filed claims against HEBC and Hartman based on the same facts in two distinct forums – here in this lawsuit and with the State of Michigan. See, State of Michigan Complaint, Appellant's Appendix, pp 211a-228a.

B. The MCPA Claims And The Court of Appeals' Rulings

In the court below, the Daileys alleged that during the course of the construction of the addition on their home, Hartman made certain misrepresentations as to future events and/or construction conditions, thereby violating the MCPA. See, Third-Party Complaint, ¶¶ 89-93, Appellant's Appendix, p 114a. Accordingly, in response, Hartman claimed that he was exempt from liability under the MCPA. More specifically, Hartman claimed that licensed residential builders, while engaged in the general

transaction of the construction, maintenance and/or alteration of homes, are prohibited under the Code from engaging in the specific type of misconduct alleged by the Daileys.

The Court of Appeals agreed but, pursuant to the Court of Appeals' Opinion in *Forton v Laszar*, 239 Mich App 711; 609 NW2d 850 (2000), lv den 463 Mich 969 (2001), and MCR 7.215(J), held Hartman liable under the MCPA. See, 5/26/05 Opinion, pp 4-5, Appellant's Appendix, pp 41a-42a. The Court of Appeals declared a conflict with *Forton* for the stated reason that, "if we were not bound by [*Forton*], we would hold that the MCPA does not apply to the performance of residential construction, renovation or repair by licensed residential builders." The Court of Appeals, however, denied convening of a special panel. See, 6/22/05 Order, Appellant's Appendix, p 46a. Thereafter, the Court of Appeals denied Hartman's Motion for Reconsideration – **notwithstanding that all three panel members agreed that the MCPA does not apply to residential builders.** See, 9/13/05 Order, p 1, Appellant's Appendix, p 47a. For the reasons discussed below, *Forton* may be distinguished and, following *Smith*, this Court may rule that licensed residential builders and, here, Hartman, are exempt from claims made under the MCPA.

IV. ARGUMENT

A. Standard Of Review

The standard of review in this matter is *de novo* as it involves the interpretation and application of a statute. See, *McJunkin v Cellasto Plastic Corp*, 461 Mich 590, 596; 608 NW2d 57 (2000), citing *Lincoln v General Motors Corp*, 461 Mich 483, 489-490; 607 NW2d 73 (2000).

B. As A Matter Of Law, Residential Builders Are Exempt From Liability Under The MCPA

In adopting the MCPA, the Michigan Legislature expressly excluded from coverage:

> A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.

MCL 445.904(1)(a).

The clear language of MCL 445.904(1)(a) and its proper application was set forth by this Court in *Smith*, *supra*. Therefore, quite simply, the law in Michigan is that where the acting party is engaged in a transaction or conduct subject to regulation by a state board, the acting party is exempt from liability under the MCPA.

1. The Conduct Of Licensed Residential Builders Is Pervasively Regulated By The State of Michigan

As noted above, residential builders in Michigan are both licensed and regulated by the State of Michigan under the provisions of the Code, MCL 339.101, *et seq*.

Most of the provisions dealing specifically with residential builders are found in Article 24 of the Code, MCL 339.2401 – MCL 339.2412. Specifically, pursuant to § 2402 of the Code, MCL 339.2402, a board of residential builders and maintenance and alteration contractors (the "Board") is created within the Department of Labor and Economic Growth, f/k/a the Department of Consumer and Industry Services (the

"Department"). MCL 339.2402 and MCL 339.307(1).[3] Among other things, the Board is responsible for promulgating rules which set minimal standards of practice, interpreting licensure and registration requirements, and assessing penalties for violating the Code or rules. See, MCL 339.307 – MCL 339.317. In Michigan, subject to certain narrow exceptions, only a person who possesses a residential builder's license is authorized to engage in the practice of residential building. See, MCL 339.601(1); MCL 339.2403.[4]

Pursuant to Article 24 of the Code, individuals and principals of various entities to whom a builder's license has been issued are subject to specific regulations. Among those things the Code and Rules prohibit, and most pertinent to the instant case, are: failing to perform a contract in a workmanlike manner and failing to comply with the applicable building code. MCL 339.2411(2). In addition, the Code also prohibits: (a) fraud, dishonesty, and false advertising, MCL 339.604; MCL 338.1551(4); (b) abandonment without legal excuse of a contract/construction project; (c) diversion of funds or property received for completion of a specific construction project or operation; (d) failure to account for or remit money coming into the persons's possession which belongs to others; (e) a willful departure from or disregard of plans or specifications in a material respect, without consent; (f) a willful violation of the building laws of the state or of a political subdivision of the state (g) in a maintenance and alteration contract,

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[3] Pursuant to Executive Order 1996-2, MCL 445.2001, references in the Code to the Department of Commerce should be construed to mean the Bureau of Commercial Services within the Michigan Department of Consumer & Industry Services.

[4] There is no dispute in this case that HEBC and Hartman are licensed residential builders subject to regulation under the Code.

failure to furnish to a lender the purchaser's signed completion certificate; (h) failure of a licensed residential builder or licensed maintenance and alteration contractor to notify the department within 10 days of a change in the control or direction of the business of the licensee; (i) failure to deliver to the purchaser the entire agreement of the parties; (j) if a salesperson, failure to pay over immediately upon receipt money received by the salesperson in connection with a transaction governed by Article 24 to the residential builder or residential maintenance and alternation contractor under whom the salesperson is licensed; (k) aiding or abetting an unlicensed person to evade Article 24; (l) acceptance of a commission, bonus, or other valuable consideration by a salesperson from a person other than the residential builder under whom the person is licensed; and (m) becoming insolvent, filing bankruptcy, becoming subject to a receivership, failing to satisfy judgments or liens, or failing to pay an obligation as it becomes due in the ordinary course of business. MCL 339.2411(2).

A violation of any of the above, or any of the other numerous regulations under Article 24, allows a homeowner to file a complaint with the Department. MCL 338.1551. After filing of a complaint, the Department prosecutes the case free of charge to the homeowner. In doing so, the Department may, among other things, require a builder to appear for an investigative conference and/or require a builder to appear and show cause why his/her license should not be revoked. MCL 338.1552 and MCL 338.1553(3). Further, the Code provides that after an investigation has been conducted, a formal complaint may be issued by the Department and served on a builder, accompanied by a notice offering the builder a choice between: (1) an opportunity to meet with the

Department to negotiate a settlement; (2) an opportunity to demonstrate compliance prior to holding a contested case hearing; or (3) an opportunity to proceed to a contested hearing. MCL 339.508.

If a builder elects to try and negotiate a settlement and those efforts prove unsuccessful, the matter will proceed to a formal administrative hearing. Moreover, even where a builder reaches a settlement or resolution with the homeowner, the Department may (and does) nonetheless still proceed against the builder and take disciplinary action and impose sanctions against the builder. MCL 338.1553(3). These sanctions include, but are not limited to, license suspension, license revocation, civil fines and, most importantly, restitution. MCL 339.602.

In fact, here, the Daileys filed a complaint with the Department, which resulted in a formal complaint being issued by the Department against HEBC and Hartman. See, State of Michigan Complaint, Appellant's Appendix, pp 211a-228a. Thus, HEBC and Hartman are already subject to liability for the precise alleged conduct at issue in this lawsuit and are subject to the sanctions listed below – which include restitution. As discussed below, the potential for double liability for the same alleged conduct to the same parties is not what was intended by the MCPA.

2. As A Matter Of Law, Licensed Residential Builders Engaged In The Authorized Practice Of Residential Building Are Exempt From Liability Under The MCPA

The conclusion that the above regulatory scheme exempts builders from liability under the MCPA is compelled by this Court's decision in *Smith v Globe Life Ins*

Co, 460 Mich 446; 597 NW2d 28 (1999). In *Smith*, this Court held that the exemption provided for by MCL 445.904(1)(a) applies so long as the "general transaction" at issue is authorized by law, even though the legality of the defendant's conduct in performing the transaction might be the subject of dispute. *Smith*, 460 Mich at 465-466; *Dressel v Ameribank*, 247 Mich App 133, 146; 635 NW2d 328 (2001), rev'd on other grounds 468 Mich 557 (2003).

The plaintiff in *Smith* alleged that the defendant insurance company violated the MCPA by making numerous misrepresentations about a policy of credit life insurance purchased by the plaintiff's decedent. *Smith, supra*, 460 Mich at 450-451. The Court of Appeals held that the legislature did not intend to exempt illegal conduct from coverage under the MCPA, and thus, the exemption contained in § 4(1)(a) would not apply. *Id.* at 453. This Court reversed, concluding that "when the Legislature said that transactions or conduct specifically authorized by law are exempt from the MCPA, it intended to include conduct the legality of which is in dispute." This Court explained that "the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is specifically authorized. Rather, it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited." *Id*. at 465-466 (footnotes omitted).

Thus, under this Court's decision in *Smith*, the exemption under the MCPA applies whenever the general transaction in question is authorized by laws administered by a regulatory board or officer of this State. In other words, *Smith* placed

the focus on the authorized nature of the "general transaction" rather than the alleged "specific misconduct."

In deciding *Smith*, this Court relied on its prior decision in *Atty General v Diamond Mortgage Co*, 414 Mich 603; 327 NW2d 805 (1982), along with this Court's decision in *Kekel v Allstate Ins Co*, 144 Mich App 379; 375 NW2d 455 (1985). This Court's discussion of this case law also provides a historical analysis of the MCPA exemption issue.

In *Diamond Mortgage*, this Court held that a mortgage company's real estate broker's license would not insulate it from liability under the MCPA for fraudulent activities committed in connection with writing mortgages. *Id*. at 615-617. The basis for this holding was that the general activity – i.e., mortgage writing – was not something that was authorized by the defendant's real estate broker's license – that is, it was not an activity performed by the defendant which was regulated by the State. Summarizing the holding in *Diamond Mortgage*, this Court in *Smith* explained:

> The defendant in Diamond Mortgage argued that it was exempt from the MCPA under § 4(1)(a) because it had a real estate broker's license and that one of the activities contemplated was that a licensee would negotiate the mortgage of real estate. Like plaintiff here, the defendants in Diamond Mortgage responded that "no statute [or regulatory agency] specifically authorize[d] misrepresentations or false promises" made in conducting that activity.
>
> In concluding that the defendants were not exempt from the MCPA, this Court reasoned:
>
> > While the license generally authorizes Diamond to engage in the activities of a real

> estate broker, it does not specifically authorize the conduct that plaintiff alleges is violative of the Michigan Consumer Protection Act, nor transactions that result from that conduct. In so concluding, we disagree that the exemption of § 4(1) becomes meaningless. While defendants are correct in stating that no statute or regulatory agency specifically authorizes misrepresentations or false promises, the exemption will nevertheless apply where a party seeks to attach such labels to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." For this case, we need only decide that a real estate broker's license is not specific authority for all the conduct and transactions of the licensee's business.
>
> In short, Diamond Mortgage instructs that the focus is on whether the transaction at issue, not the alleged misconduct, is "specifically authorized." Thus, the defendant in Diamond Mortgage was not exempt from the MCPA because the transaction at issue, mortgage writing, was not "specifically authorized" under the defendant's real estate broker's license.

Id. at 463-464.

This Court in *Smith* continued its analysis with a discussion of *Kekel*. In this regard, the Court explained:

> Applying [the *Diamond Mortgage*] analysis in *Kekel*, the Court of Appeals concluded that the defendant insurer in that case was exempted from the plaintiff's alleged violations of the MCPA pursuant to M.C.L. § 445.903; MSA 19.418(3). It explained:
>
> > *Diamond* is distinguishable from the case at bar. The activities of the defendant in

> *Diamond* which the plaintiffs there were complaining of were not subject to any regulation under the real estate broker's license of the defendant and thus such conduct was not reviewable by the applicable licensing or regulatory authority . . . . The insurance industry is under the authority of the State Commissioner or Insurance and subject to the extensive statutory and regulatory scheme, all administered "by a regulatory board or officer acting under statutory authority of this state."

Smith, *supra* at 464-465.

The proper application of *Smith* is illustrated by *Dressel v Ameribank*, 247 Mich App 133; 635 NW2d 328 (2001), rev'd on other grounds 468 Mich 557 (2003), in which the Court of Appeals analyzed the Section 4(1)(a) exemption as it applies to the lending practices of a bank. Although recognizing that the plaintiffs' individual cause of action could still go forward under recent amendments to the Savings Bank Act, MCL 445.904(2)(d), the Court nonetheless reasoned that the bank's conduct was exempt under the provisions of Section 4(1)(a).[5] In relevant part, the Court in *Dressel* explained:

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[5] In holding that the plaintiffs' suit could still proceed, the panel in *Dressel* held:

> However, M.C.L. 445.904(2)(d), as amended by 2000 PA 432, provides an exception for actions filed by individuals challenging acts or practices made unlawful by the Savings Bank Act. Because defendant's actions were unlawful under the Savings Bank Act, an action under the MCPA is not precluded, regardless of the fact that defendant's general activities were specifically authorized. See, *Smith, supra* at 467; 597 NW2d 28.

Id. (emphasis added).

> Our Supreme Court, in *Smith, supra* at 462, 597 N.W.2d 28, considered the applicability of the language of subsection 4(1)(a) of the MCPA, M.C.L. § 445.904(1)(a), which provides that the MCPA is inapplicable to a **"transaction or conduct specifically authorized under laws *administered by a regulatory board or officer acting under statutory authority of this state*** . . . ." Emphasis added. The *Smith* Court concluded that the defendant insurance company's general transactions were specifically authorized by law and, accordingly, were exempt from the MCPA. *Smith, supra* at 465, 597 N.W.2d 28. Similarly, defendant in the instant case was specifically authorized by law to make loans, M.C.L. § 487.3401, and was regulated by the Financial Institutions Bureau of this state as well as federal authorities, M.C.L. § 445.1601 *et seq*.

Id. at 146 (emphasis added).

Thus, *Smith* and *Dressel* make clear that where the general activity of the defendant is regulated by the State or other governing body, that defendant is exempt under the MCPA. Here, the general activity of maintenance and repair of a home is a regulated activity and Hartman is, therefore, exempt under the MCPA.

C. The *Forton* Decision Does Not Compel A Different Conclusion

As indicated, the Court of Appeals felt compelled to reach its conclusion that residential builders are not exempt under the MCPA because of *Forton*. However, *Forton* can be distinguished from this case. In *Forton*, plaintiffs alleged that defendant, builder, breached the parties' contract by failing to construct the home in a "good and work-like manner," and by deviating from the parties' plans and specifications without plaintiffs' knowledge or consent. Plaintiffs' claims sounded in breach of contract and violations of the MCPA. Almost identical to the claims made in the present case, the

"general transaction" engaged in – the building and sale of a new residential home – was regulated by the Department. However, in *Forton*, the defendant did not raise the Section 4(1)(a) exemption until the filing of a motion for rehearing in the Court of Appeals. Accordingly, the Court of Appeals in *Forton* did not, and could not, find the defendant builder to be exempt under the MCPA. Quite simply, the issue was never presented in a timely fashion to the Court of Appeals. *Forton*, 239 Mich App at 716-717.

This Court denied the defendant builder's application for leave to appeal in *Forton*. See, *Forton v Laszar*, 463 Mich 969; 622 NW2d 61 (2001), lv den 463 Mich 969 (2001). Notwithstanding the omission of timely raising the exemption, in relevant part, Justice Corrigan observed:

> Subsection 4(1)(a) of the MCPA provides that the MCPA "does not apply" to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." Defendant now contends that his sale to plaintiffs comes within this exemption because he is a residential builder licensed and regulated under the Michigan Occupational Code, M.C.L. § 339.101 *et seq*; MSA 18.425(101) *et seq*. Of particular importance, argues defendant, is article 24 of the Occupational Code, which prohibits residential builders from departing from plans without consent. See M.C.L. § 339.2411(2)(d); MSA 18.425(2411)(2)(d). In *Smith, supra*, we explained that the words "transaction or conduct" in subsection 4(1)(a) of the MCPA referred to the general transaction at issue rather than the specific misconduct alleged. We then held that subsection 4(1)(a) exempted the sale of credit life insurance from the MCPA, because (1) the sale of credit life insurance was specifically authorized under the state laws governing the sale of insurance, and (2) those laws were administered by the Insurance Commissioner. Arguably, the logic of *Smith* would apply equally to defendant's sale of a residential home, because (1) portions of the

> Occupational Code regulate the conduct of residential builders, and (2) residential builders are regulated by the Residential Builders' and Maintenance and Alteration Contractors' Board.

Forton, *supra*, 463 Mich at 970 (Opinion of Corrigan, J.). Therefore, *Forton* may be distinguished from the present case and does not compel the conclusion reached either in the 5/26/05 Opinion or the 9/13/05 Order.

In fact, this is precisely what the Court of Appeals did in *Shinney v Cambridge Homes, Inc*, 2005 WL 415492 (Mich App, February 22, 2005), wherein the Court of Appeals held that the exemption to the MCPA applied to residential builders, stating:

> This Court has held that "residential builders are subject to claims of unfair or deceptive trade practices under the MCPA" because "the definition of 'trade or commerce' [in MCL 445.903(1)] includes residential builders who construct and sell homes for personal family use." *Forton v. Laszar,* 239 Mich.App 711, 715; 609 NW2d 850 (2000). However, this Court did not address the application of MCL 445.904(1)(a) to a residential builder.
>
> [Defendant] is authorized to build residential structures for payment from another. MCL 339.2401(a). The home purchase agreement explains that Cambridge agreed to do so. Because Cambridge engaged in a "general transaction [ ] specifically authorized by law," *Smith, supra* at 465, the transaction was exempt from the MCPA under MCL 445.904(1)(a). Accordingly, we hold that the trial court correctly ruled that Cambridge is immune to the imposition of attorney fees.

Shinney at p 3, Appellant's Appendix, pp 234a-236a.

Again, *Forton* did not compel reversal of the trial court's opinion. In fact, *Forton* should be overruled as to its statement that residential builders are uniformly subject to the MCPA.

D. The Court of Appeals' Decision In *Winans* Presents The Better View On The MCPA Exemption Issue

In *Winans v Paul & Marlene, Inc*, 2003 WL 21540437 (Mich App, July 8, 2003), plaintiff, homeowners, sued defendant, builder, after defendant builder constructed a home on plaintiff's property following which, plaintiffs experienced severe flooding in the basement. The plaintiff homeowners sued defendant builder, alleging two separate violations of the MCPA. Specifically, the Winans alleged that: (1) by failing to repair their home, defendant builder caused confusion/misunderstanding of their legal rights; and (2) the leaking basement in the homeowners' residence was the result of defendant builder's deceptive representations concerning the quality and standard of construction work performed on the home. This alleged misconduct, like that alleged in this case, are acts for which builders are specifically regulated under the Code.

In response, defendant builder claimed that it was exempt from liability under the MCPA for the reason that construction of the plaintiffs' home was conduct specifically authorized by laws administered by a regulatory board. Defendant builder made these claims in the form of a motion for directed verdict which followed the conclusion of proofs at trial.

The trial court denied defendant builder's motion and the Court of Appeals reversed based on *Smith*, *supra*, stating:

> Defendant first argues that the trial court erred in denying its motion for directed verdict on the Consumer Protection Act claim because, as a licensed contractor, it is exempt from the Consumer Protection Act under the Supreme Court's decision in *Smith v Globe Life Ins Co,* 460 Mich 446; 597 NW2d 28 (1999). We agree.

Winans at p 2.

The *Winans* Court discussed the relevant line of inquiry under *Smith* based on the allegations made by plaintiff-homeowners in their complaint. The Court stated:

> Thus the question in the case at bar is whether the activity involved comes within the scope of the residential builder licensing scheme. Defendant identifies the activity as being the construction of a residential house, an activity clearly covered by the residential builder section of the Occupational Code. See MCL 339.2401 *et seq*. Not surprisingly, plaintiffs' brief identifies a much narrower activity as being involved, namely "advising Appellees as to the location of the house on the lot that they had purchased, making decisions regarding wetlands, or misleading the Appellees as to what their role and relationship was." This differs somewhat from what plaintiffs identified as the MCPA violations in their complaint, which alleged as follows:
>
> > 45. As a result of the failure to repair the property, the Defendant has acted in such a manner as to cause a probability of confusion or misunderstanding of the legal rights and obligations of the Plaintiffs in violation of Michigan's Consumer Protection Act, MCLA 445.901 et. seq.
> >
> > 46. The Defendant made deceptive representations about the quality and standard of the construction work performed on the residence and its premises, in violation of the Michigan Consumer Protection Act.

> In any event, we believe that plaintiffs take an unreasonably narrow view of the scope of the transaction or conduct involved in determining whether this case falls within the holding in *Diamond Mortgage* or within the holding of *Smith*. We think that *Smith* makes it clear that we look to the general transaction involved, not the specific action which plaintiff alleges violates the MCPA. Here, the general transaction was the construction of a residence on plaintiffs' lot, which is regulated. That is to say, while the actions in *Diamond Mortgage* of writing mortgages was not the type of activity for which one needs a real estate broker's license, the actions in the case are [sic] bar are those of someone who needs a residential builder's license.

Winans at pp 3-4, Appellant's Appendix, pp 237a-246a.

Accordingly, while *Winans* is a Court of Appeals unpublished decision, it is nonetheless instructive on, and factually applicable to, the present case. The *Winans* decision properly applied *Smith* to facts very similar to this case. By contrast, the *Forton* court did not even consider *Smith*, and did not consider the exemption to the MCPA.

E. It Is In The Interests Of Public Policy To Reverse The Decision Of The Court Of Appeals For The Reason That The Occupational Code Created No Private Cause Of Action, Nor Can One Be Implied

Because residential builders are regulated by the State, and subject to severe penalties from the Department for violating those regulations, the Code itself does not create a private cause of action. Nor can one be implied.

Specifically, a statute which creates a duty or right not present under common law can only give rise to a private cause of action if it does so expressly or its means of enforcement are clearly inadequate. *Lamphere Schools v Lamphere Federation*

of Teachers, 400 Mich 104, 126; 252 NW2d 818 (1977). In *Lamphere Schools*, this Court observed:

> The general rule, in which Michigan is in line with a strong majority of jurisdictions, is that where a new right is created or a new duty imposed by statute, the remedy provided for enforcement of that right by the statute for its violation and the non-performance is exclusive.

Lamphere Schools, 400 Mich at 126, quoting *Thurston v Prentiss*, 1 Mich 193 (1849).

Likewise, in *Forster v Delton School Dist*, 176 Mich App 582; 440 NW2d 421 (1989), the Court of Appeals held that there was no private cause of action under either Michigan's Campaign Finance Act or the Political Activities & Public Employees Act:

> Because the campaign financing act [and political activities act] creates new rights and imposes new duties, the remedies provided in the act are the exclusive means by which the right may be enforced. Since the act provides an adequate remedy to enforce its provisions, no private right of action can be inferred. Therefore, plaintiffs' claims under the campaign financing act [and the political activities act] . . . were properly dismissed by the circuit court.

Forster, 176 Mich App at 585.

By its terms, the Code does not set forth a private cause of action. Nothing in the Code expressly permits a third party to sue based upon a builder's alleged violation of the Code. To the contrary, as indicated, Article 6 of the Code provides for numerous penalties and remedies, including a requirement that restitution be made. MCL 339.602. These penalties are the exclusive remedies provided by the Code and are enforceable only by the Department or, where appropriate, the Attorney General.

In sum, the Legislature did not create a private cause of action or private remedy under the Code. Therefore, none should be created under the guise of the MCPA.

F. It Is In The Interests Of Public Policy To Reverse The Decision Of The Court Of Appeals For The Reason That It Subjects Residential Builders (And Other State Licensees) To Duplicative Liability

As illustrated by this case, in which the Daileys sued HEBC and Hartman in the circuit court and filed a Complaint with the Department – based upon the same alleged conduct – the practical effect of the Court of Appeals' Opinion is to subject all State licensees (including builders) to liability in multiple forums for the same claims. Further yet is the distinct possibility of duplicative and/or varied outcomes/verdicts. This increased liability violates the public policies behind the doctrines of *res judicata* and collateral estoppel. See, *Schwartz v City of Flint*, 187 Mich App 191; 466 NW2d 357 (1991) (doctrine of *res judicata* is a manifestation of recognition that interminable litigation leads to vexation, confusion and chaos for litigants resulting in an inefficient use of judicial time); *Pike v City of Wyoming*, 431 Mich 589, 628; 433 NW2d 768 (1988) (historically, the application of *res judicata* has been determined by reference to an overriding policy of fairness and finality). Further, this increased liability can only translate into increased costs for residential housing.

G. It Is In The Interests Of Public Policy To Reverse The Decision Of The Court Of Appeals For Reasons Of Judicial Economy

This case, filed in 2001, illustrates that protracted circuit court litigation does not provide a more "practical" or "effective" remedy than the State of Michigan

administrative process. By their very nature, regulatory boards have the "built-in" expertise necessary to resolve professional service disputes in a more knowledgeable and informed fashion than the average jury. Moreover, the consumer is often spared the need to hire an attorney, as the Department effectively "prosecutes" the dispute on the claimant's behalf.

In this regard, the consumer's role in initiating the complaint process is minimal. The consumer contacts the Department and receives and completes a simple complaint form. The complaint form is sent by the consumer to the Department. The Department or the consumer has an inspection report prepared by the local building inspector. The Department then investigates and prosecutes the claims for the consumer, including the procuring of witnesses, settlement negotiations and trial. All of these services are free, and no attorney is needed.

In contrast, the availability of an award of attorney fees under the MCPA, MCL 445.911(2), frequently results in an MCPA claim being "tacked on" to lawsuits that are nothing more than monetarily small, simple contract claims against builders and other regulated trades. By way of example, the Association is aware of one case arising in Washtenaw County where the plaintiffs were awarded $507 in damages and $18,937.75 in attorney fees on their MCPA claim (against which the exemption was not raised as a defense) against a licensed REALTOR® who allegedly mishandled an earnest money deposit. Indeed, because the Department typically can resolve consumer complaints without judicial intervention, this "tacking on" of MCPA claims is a perversion of the statutory and regulatory scheme.

Obviously, the availability of attorney fees to private plaintiffs was designed to create a "private police" mechanism whereby consumers could pursue violations of the MCPA in cases where it would be otherwise cost prohibitive to do so. In the case of builders, however, the policing authority already exists in the form of the Department, who prosecutes the claim on the consumer's behalf. As *Smith* appropriately recognizes, the very purpose of the exemption was to ensure that consumer disputes involving builders were resolved in that forum.

V. CONCLUSION AND RELIEF REQUESTED

For all the within stated reasons, the Association respectfully requests that this Honorable Court grant the Association's Motion for Leave to File Amicus Curiae, reverse the Court of Appeals and reinstate the trial court's grant of summary disposition in favor of Hartman and rule, as a matter of law, that licensed residential builders, when engaged in a regulated activity, are exempt from liability under the MCPA. This Court should further overrule *Forton*, *supra*, to the extent that it is inconsistent with this Court's ruling in *Smith*.

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